In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 487

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES E. O'DONNELL ET AL.

MEMORANDUM IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

The brief for the respondents in opposition seems to us somewhat to confuse the issues presented by the petition for a writ of certiorari. Accordingly, this memorandum in reply is respectfully submitted.

1. *Adverse Possession.*—The petition (pp. 29–33) presented the error of the court below in reversing the trial court without considering the ground of the trial court's decision—that the United States had acquired title to the lands in question by adverse possession. Respondents seek to justify this action by arguing, first, that consideration of the evidence *de novo* would indicate that the trial court erred in its finding of adverse and open possession (Br. 12–13). The record of-

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fers ample evidence to support the unequivocal finding of fact by the trial court (R. 171–172; see R. 328–329, 379–383, 583–590, 784–786, 800–838). While respondents dispute this finding, they offer only evidence, not in the record before this Court, which they prepared, that prior to 1914 "the United States had placed on the land only temporary improvements" (Br. 13). But plainly it is not necessary that improvements be permanent in nature if title is to be acquired by adverse possession. See *United States* v. *Oregon*, 295 U. S. 1, 25.

Respondents, however, seem to rest their case chiefly upon "the constant efforts of respondents and their predecessors * * * to enforce their rights to this property" (Br. 13). This contention is contrary to the express finding of the trial court (R. 197). It is, in addition, contradicted, in point of law, by the case relied upon by respondents and, in point of fact, by respondents' own statement.

A mere protest to Government officers is not sufficient in a case such as this to prevent the ripening of title by prescription. *Stanley* v. *Schwalby*, 147 U. S. 508, 517, suggests that "protest against the occupancy and application for redress in the proper quarter" might be sufficient if there were no judicial remedy. But here respondents have at all times had a judicial remedy, which they finally invoked in 1925. They had simply to obtain a writ of mandamus against the appropriate official and thus secure a patent to the lands; thereafter they

had full capacity to bring an action in ejectment. Since ultimately they did in fact successfully pursue this course, in *Work* v. *United States*, 23 F. (2d) 136 (App. D. C.), there can be no question as to the feasibility of such procedure to remove any incapacity to bring judicial action.

But even if mere protest were sufficient to bar title by adverse possession, it is to be observed that respondents' own statement (Br. 6, 13) shows that nonetheless such a title now vests in the United States. The United States took possession of the land in 1853, and has occupied it ever since (R. 171). Twenty years later, in 1873, the Secretary of the Navy was informed that "certain parties" claimed the land, and that the Federal authorities had been admonished not to take sand from the land. Six years later, in 1879, a formal protest was filed with the Surveyor-General and the Lands Commissioner by respondents' predecessors. Twenty-six years later, in 1905, judicial proceedings were finally commenced. In California a prescriptive title ripens in five years.[1] It seems plain that the United States acquired title by adverse possession not only once but many times over.

2. *Conclusiveness of the Decree.*—On this issue we think it important to point out that the re-

[1] Code of Civil Procedure, Secs. 315–325 (derived from Acts of 1850, p. 843). While a ten-year period applies to claims against the State or its grantees, upon issuance of the State patent (1857 in this case), the five-year period becomes applicable. *Wilhoit* v. *Tubbs*, 83 Cal. 279.

spondents do not dispute our main contentions. (a) It is not denied that the court below interjected the issue of fraud and misconduct by the United States in the absence of pleadings, proof or assignment of errors directed to this issue[2] (Pet. 14–15). (b) There is no argument that the United States was not in fact proceeding in good faith[3] (Pet. 15–18). (c) The respondents do not dispute that while the litigation was pending California not only knew of the purchase, but actually cooperated with the United States in its acquisition (Pet. 18).

Finally, as to laches, we wish to point out that respondents rely (Br. 12) on the same inadequate record of sporadic protest which we have discussed under the issue of adverse possession.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be granted.

STANLEY REED,
Solicitor General.

NOVEMBER 1937.

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[2] The record references set out by respondents (Br. 12) relate, it should be noted, not to the issue of misconduct but to the asserted incapacity of the United States as trustee to acquire a title adverse to its alleged *cestui que trust.*

[3] Respondents state (Br. 7), but do not rely upon it in their argument, that not until 1930 was the District Court informed of the purchase of the claim of Bissell and Aspinwall. This is erroneous (Pet. 17).

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